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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JESSE JOE CANDIA, Defendant and Appellant.	F045107 (Super. Ct. No. MCR13175) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Madera County. John W. DeGroot, Judge.

William Davies, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, and Charles A. French, Deputy Attorney General, for Plaintiff and Respondent.

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INTRODUCTION

On October 8, 2002, appellant, Jesse Joe Candia, pled no contest to possession of methamphetamine (Health & Saf. Code, § 11377, subd,. (a)) on condition that he be

* Before Vartabedian, Acting P.J., Harris, J., and Levy, J.

placed on Proposition 36 probation and with the understanding that if his probation was revoked he could be sentenced to a maximum term of three years. On December 3, 2002, the court suspended imposition of sentence and placed Candia on Proposition 36 probation. Following several probation violations, on January 15, 2004, the court imposed the aggravated term of three years. In imposing the aggravated term, the court found as aggravating circumstances that Candia's prior convictions were numerous,[1] he was on probation when he committed the underlying offense, and his prior performance on probation was unsatisfactory.

On June 28, 2004, Candia filed a brief pursuant to *People* v. *Wende* (1979) 25 Cal.3d 436 but subsequently withdrew that brief by filing a brief challenging his upper term sentence under *Blakely v. Washington* (2004) 542 U.S. ___, ___ [124 S.Ct. 2531, ___] (*Blakely*). We will affirm.

DISCUSSION

Candia contends the court could not impose the upper term utilizing aggravating factors that were not found true beyond a reasonable doubt by the jury. This contention is based on the recent United States Supreme Court case of *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348]. In our view, the holdings in *Blakely* and *Apprendi* do not apply when the exercise of judicial discretion is kept within a sentencing range authorized by statute for the specific crime of which the defendant is convicted by jury or pleads to.

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[1] The probation report indicates that from 1991 through July 2002, Candia sustained convictions for possession for sale of marijuana (Health & Saf., Code, § 11359), possession of less than an ounce of marijuana (Health & Saf. Code, § 11357, subd. (c)), welfare fraud (Welf. & Inst. Code, § 10980, subd. (g)), obstructing an executive officer (Pen. Code, § 69), and possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)).

Based on constitutional history, *Apprendi* advises, "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion--taking into consideration various factors relating both to offense and offender--in imposing judgment *within the range* prescribed by statute." (*Apprendi v. New Jersey*, *supra,* 530 U.S. at p. 481.) *Apprendi* instructs further that a "sentencing factor" is distinguishable from a "sentence enhancement": the former is a "circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." The latter is "used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." (*Id* at p. 494, fn.19.)

In *Blakely,* while the sentence was within the indeterminate maximum for the category of the offense (class B felony), the sentenced term exceeded the specific range set by the Washington state statute for the offense; the trial court's excessive term was based on facts not found by the jury and thus constitutionally excessive. (*Blakely v. Washington, supra,* 542 U.S. at p. ____ [124 S.Ct. at p. 2534].)

Given this backdrop, we find California's determinate sentencing law constitutional and Candia's present sentence constitutionally permitted. Under this state's determinate sentencing law, each applicable specific offense is given a sentencing range that includes lower, middle, and upper terms. A defendant's right to a jury trial for that offense is with the understanding that the upper term is the maximum incarceration he may be required to serve if convicted of the specific offense for which he faces trial. Should the People allege enhancement charges, those are separately charged and the defendant is entitled to a jury's determination of the truth of such charges.

The determination of the court's choice of term within the particular range allowed for a specific offense is determined after an evaluation of factors in mitigation and aggravation. These sentencing factors, consistent with the definition found in *Apprendi,*

are weighed by the sentencing judge in determining the term of punishment within the specific offense's sentencing range. If there are no such factors or neither the aggravating nor mitigating factors preponderate, the court shall choose the middle term; additionally, the court retains the discretion to impose either the upper or middle term where it finds the upper term is justifiable. (*People v. Thornton* (1985) 167 Cal.App.3d 72, 77.) Such an exercise of discretion does not violate the constitutional principles set forth in *Apprendi* and followed in *Blakely* because the court's discretion is exercised within the specific statutory range of sentence.[2]

Here, the trial court selected the upper term based upon its analysis of sentencing factors noted above. This choice of term was within the statutory range allowed for the specific offense of possession of methamphetamine. No constitutional violation occurred.

Moreover even if we found that *Blakely* and *Apprendi* applied to California's determinate sentencing law, we would reject Candia's claim of error. Plea bargaining is a judicially and legislatively recognized procedure that provides reciprocal benefits to the People and the defendant. (*People v. Masloski* (2001) 25 Cal.4th 1212, 1216; *People v. Orin* (1975) 13 Cal.3d 937, 942; Pen. Code, § 1192.5.) When, as part of a plea agreement, a defendant agrees to the maximum sentence that may be imposed, he necessarily admits that his conduct is sufficient to expose him to that punishment and reserves only the exercise of the trial court's sentencing discretion in determining whether to impose that sentence. (See Advisory Com. com., Cal. Rules of Court, rule

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2 Our conclusion finds support in the recent amplification of *Apprendi* -- *Blakely* found in *United States v. Booker* (Jan 12, 2005, No. 04-104) 543 U.S. ___ [2005 WL 50108]. We distill from *Booker* the following refinement for our present purposes: *If a fact necessarily results in a higher sentence, the fact must be admitted by defendant or found by the jury.* Because California's sentencing law vests in the trial court's discretion to choose the upper or middle term even where aggravating factors are found which preponderate, the present sentence is constitutionally permitted.

4.412(b).) ["a defendant who, with the advice of counsel, expresses agreement to a specified prison term normally is acknowledging that the term is appropriate for his or her total course of conduct."]) *Apprendi* and *Blakely* do not preclude the exercise of discretion by a sentencing court so long as the sentence imposed is within the range to which the defendant was exposed by his admissions. (*Blakely*, *supra*, 124 S.Ct. at p. 2541.)

That is the case here. In open court, Candia agreed that he could be sentenced to no more than three years in state prison as a result of his plea. Candia's plea in effect admitted the existence of facts necessary to impose that upper term on the possession of the methamphetamine offense. A sentence within the maximum allowed by the facts Candia admitted does not violate *Blakely*. (*United States v. Lucca* (8th Cir. 2004) 377 F.3d 927, 934; *United States v. Saldivar-Trujillo* (6th Cir. 2004) 380 F.3d 274; cf. *United States v. Silva* (9th Cir. 2001) 247 F.3d 1051, 1060 [no *Apprendi* error when sentence is within range under facts admitted by the defendants in guilty pleas].)

Alternatively, even if the above analyses are not accepted, we find any *Blakely* error harmless for another reason as well. The reasons the trial court gave for imposing the upper term related to Candia's prior convictions and their penal consequences: Candia's prior convictions as an adult and sustained juvenile delinquency petitions were numerous, he was on probation when this crime was committed, and his prior performance on probation had been unsatisfactory. These facts were included in the probation report prepared for sentencing and Candia did not contest them.

The rule of *Apprendi* and *Blakely* does not apply to the fact of a prior conviction used to increase the penalty for a crime. (*Apprendi, supra*, 530 U.S. at p. 490.) Case law has not flushed out whether other factors relating to the defendant's recidivism fall within the *Apprendi* prior conviction exception. (See e.g., *People v. Vu* (2004) 124 Cal.App.4th 1060, 1069.) However, regardless of whether all of the recidivist related factors the court utilized fell within the prior conviction exception, one valid factor in aggravation is

sufficient to expose the defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433). Accordingly, assuming *Blakely* error in relying on the prior prison term, probation status, and poor probation performance in imposing the upper term, such error was harmless in light of Candia's five prior convictions since 1991. (*People v. Emerson* (2004) 124 Cal.App.4th 171, 180.)

DISPOSITION

The judgment is affirmed.